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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v.

MARK D. EVANS, and
VERNON MESSIER,
Respondents

Case. No. 73,779

FILED
SID J. WHITE
JUL 20 1989
CLERK, SUPREME COURT
By _____ Deputy Clerk

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA
CERTIFIED QUESTIONS

REPLY BRIEF OF THE PETITIONER

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STATEMENT OF THE CASE AND FACTS

The state takes issue with appellee Evans' argumentative statement of the facts. The state has propounded no factual errors in its statement of the facts.

Initially, the state notes that at the hearing on the motion to dismiss, Evans' counsel stipulated to the record:

> MR. GUTMAN [assistant state attorney]: Before we proceed as to Mr. Evans, Your Honor, I would just like to state for the record that in hearing this motion I am interested in preserving the record for appeal if that becomes necessary.
>
> I don't have any witnesses in this case. In fact, the State really didn't have a lot of notice in order to get its witnesses here and be prepared and present them for this motion.
>
> However, the state would be ready to proceed today if it is able to stipulate that the facts relied upon for this motion were the facts contained in the depositions of Marsha Kennedy and Detective Land.
>
> MR. WINKLES [counsel for Evans]: No problem with that at all, Your Honor.
>
> THE COURT: You want to --
>
> MR. GUTMAN: If those depositions are made a part of the record.
>
> MR. WINKLES: That's fine.
>
> . . . .
>
> [MR. WINKLES, beginning to argue the motion:] The State hasn't filed a traverse -- hasn't traversed any C4 because it's not applicable in this situation.

R211-13. The remainder of the hearing shows that the parties referred to the depositions for factual background throughout the hearing, and that Evans' defense counsel not once objected to the use of the depositions.

The motion to dismiss was filed February 5, 1988, R52, and the hearing on the motion held February 9, 1988, R209.

Evans implies that the state conceded the traverse issue when undersigned counsel stated in oral argument at the second district that he was unprepared to argue the point. Mr. Markman

fails to inform this Court that undersigned counsel informed the district court at argument, and Mr. Markman prior to the argument, that the state was hindered because of lack of notice. Undersigned counsel could not, on such short notice, ascertain that no record of notice of the argument existed in the attorney general's office, and could not, therefore, unqualifiedly state such to the court or opposing counsel on the day of argument.

As outlined in the motion to strike filed by the state in this court, the state apparently never received notice of the argument in this case. Coincidentally, undersigned counsel was appearing in Lakeland to argue another case when he learned of the scheduled argument in this case. Undersigned counsel recalled that Hunter v. State, 531 So.2d 239 (Fla. 4th DCA 1988), had been decided and filed as supplemental authority by appellees.

Rather than inconvenience the two lawyers appearing for the defendants by asking for a postponement, and believing Hunter to preempt, the state informed opposing counsel, including Markman, of the problem of lack of notice but the State's willingness to proceed. The state also informed Markman of the state's intent to essentially acquiesce to Hunter to permit passing the issue on to this Court, albeit with some argument that the position taken by the state in the briefs in this case offered the better reasoning.

At argument, the state admitted the apparent preemption of Hunter, but urged that the state would, naturally, prefer to come to this Court with a decision in conflict with Hunter. The state

further urged that Hunter at least avoided the doctrinal error committed by the trial court in this case, i.e. basing the rationale on Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985), rather than State v. Glosson, 462 So.2d 1082 (Fla. 1985). The state, of course, responded to the questioning of the district court panel as appropriate.

Undersigned counsel offered to file a supplemental brief if the second district panel believed the traverse issue had merit. No such request was forthcoming. The state apologizes for making reference to the activities at oral argument below, but the references are necessitated by Evans' counsels' unwarranted attempt to mislead this Court regarding the argument on the traverse issue.

Regarding footnote 4 of Evans' answer brief, the state did not allege in its initial brief that Evans was involved with drugs prior to the criminal episode in this case. The state did assert that the confidential informant told the detective in this case that Evans had sold her drugs in the past. Evans now complains that such testimony was hearsay, but no such complaint was made at the hearing on the motion to dismiss. Any such complaint is waived.

While complaining that the state should be bound by the facts in the motion to dismiss, Evans' statement of the facts contains numerous references to the depositions.

SUMMARY OF THE ARGUMENT

Appellee should not now be heard to complain about the use of facts to which he stipulated in the court below. The issue was waived.

There is no viable Cruz issue as the facts show no extraordinary behavior by the police or their agents.

THE CRUZ ARGUMENT

Evans now seeks to raise an objective entrapment issue which was never the basis for the trial judge's ruling, or for the district court's decision. While Evans could perhaps raise the issue on a "right for any reason" basis, the objective entrapment theory simply does not apply. The facts, by anyone's standards, show a normal transaction arranged by the CI, with no behavior by either the CI or the police which would bring the case within the purview of Cruz v. State, 465 So.2d 516 (Fla.), cert. denied, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985).

The legality, vel non, of the substantial assistance agreement, is irrelevant to a Cruz analysis, despite Evans' assertion to the contrary. Evans' Answer Brief at 34. Even if illegal and unconscionable, it certainly was well-tailored to apprehend those involved in the on-going business of selling drugs, since such agreements are made with persons directly involved in the illicit drug trade. Such persons would, therefore, know far better than the police who to approach to buy drugs.

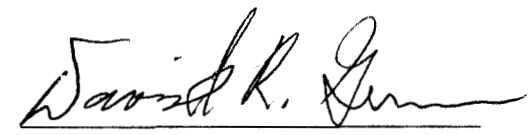
This distinction also suggests an additional rationale for distinguishing State v. Glosson, 462 So.2d 1082 (Fla. 1985). . While paid informants frequently would be outsiders thrust into the drug trade purely for pecuniary gain, confidential informants working under a substantial assistance agreement have already proven themselves to be involved in preexisting drug activity and as such will know who to contact to set up stings. In this case, even based solely on the CI's version of the facts, the CI knew to contact her boyfriend who, in turn, told her to contact Evans.

Thus, an outside instigator did not inject himself into the drug trade, raising the specter of manufacturing crimes for money. Instead, a guilty party, using her own knowledge, used that knowledge to locate persons who would sell her cocaine.

This Court should reject the Cruz defense, or, if it finds the defense arguable, remand to the trial court so that a hearing may be held whereat facts relevant to that theory of defense, rather than the Glosson issue, may be alleged and developed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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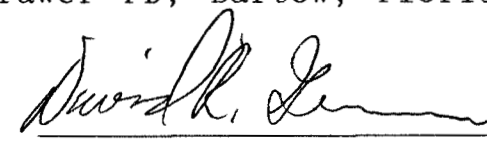
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Stuart Markman, WINKLES, TROMBLEY, KYNES & MARKMAN, P.A., 707 N. Franklin Street, Tenth Floor, P.O. Box 3356, Tampa, Florida 33601, and to Andrea Steffen, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this date, July 17, 1989.



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